Filed 1/15/19 In re Clevenger CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re SUSAN DIANE CLEVENGER,	F073991
On Habeas Corpus.	(Kern Super. Ct. No. SC081856)

ORIGINAL PROCEEDINGS; application for writ of habeas corpus.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, Darren K. Indermill, Eric L. Christoffersen, and Kari Ricci Mueller, Deputy Attorneys General, for Respondent.

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Susan Diane Clevenger (petitioner) seeks to have her felony-murder special circumstance vacated, her first degree murder conviction reversed, and her overall sentence reconsidered, based on California Supreme Court authorities decided after her convictions became final. We agree the special circumstance must be vacated.

FACTS AND PROCEDURAL HISTORY[1]

> "On Monday, August 7, 2000, Bradley St. Clair was found murdered in his investment office where he was a partner with his brother, Frank, Jr. St. Clair was found in his bookkeeper's office adjacent to his own, with his ankles, wrists and eyes bound by duct tape. The cause of death was determined to be strangulation or garroting, with his own necktie.
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> "There were several bruises and scrapes to his head and body, consistent with a struggle before his death. There was also a thin stab wound to the back of his head. The pathologist opined the stab wound was caused by either a knife or a box cutter with an extendable blade. Time of death was estimated to be between 5:00 p.m. and 6:00 p.m. that evening.
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> "The victim's wife Elisia testified that she spoke to her husband over the telephone around 5:00 p.m. on August 7, 2000. She said her husband planned to come home around 5:30 p.m. because they had dinner plans. When her husband did not arrive at 5:30 p.m., she called her husband's office and cellular phone but received no answer.
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> "Bradley St. Clair's mother, Arlana, testified that she and her husband, Frank St. Clair, were co-owners of a property management/real estate business located on Wible Road in Bakersfield. Her two sons, Frank Jr. and Bradley, co-owned a real estate investment company. Both companies operated out of the same building. [Petitioner] worked for Bradley at his investment company as secretary and property manager to one of their apartment buildings for about a year and a half before the murder.
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> "On the evening of August 7, 2000 at around 6:00 p.m., Arlana St. Clair received a call from the alarm company that serviced the office

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1 By separate order, we have taken judicial notice of the record on appeal, including the parties' briefs and our opinion, in *People v. Clevenger*, case No. F039853. We take the statement of facts from that opinion.

building. She was informed the alarm monitors at the building had been activated. Arlana then drove to the building to check on the alarm. When she arrived at the office around 6:20 p.m., she saw only Bradley's car in the parking lot. The alarm apparently had cycled off since she did not hear it. Arlana said she first walked to the northwest entrance to the building, the entrance door to her sons' business, and checked to see if the door was unlocked because she did not have a key to that door. She then knocked on the door but no one answered. She then walked to the northeast door, the entrance to her business and unlocked the door. When she entered the building she immediately noticed that the alarm panel near the door indicated that the alarm had been tripped. She attempted to deactivate the alarm but the system would not accept the alarm code. A few seconds later, the alarm again sounded. She walked a few steps into the office and called out to her son but received no response. She became apprehensive so she walked outside, propped the door open, walked across the parking lot and dialed 911. While she was on the phone with the 911 operator, Arlana walked to the front door of the building on Wible Road, opened the door with her key, and again called out to her son but no one answered.

"Officer Damo responded to the first alarm at the office building at approximately 6:04 p.m., before Arlana arrived. When the officer got there the audible alarm was ringing. Damo noticed only a white car in the parking lot, which was identified as Brad St. Clair's vehicle. Damo walked around the building, checking the doors, to see if the building was secure. About that time the officer received a call that the alarm company was attempting to cancel the response. The officer placed a note under the door to indicate he had been there, and left. The officer came back to the office building at around 6:30 p.m. in response to Arlana St. Clair's 911 call. When Damo returned, he entered the office and found Brad St. Clair's body lying face down in the secretary/bookkeeper's office.

"Nancy Ramirez worked for the alarm company that monitored the St. Clair businesses. Ms. Ramirez testified that on the evening of August 7th, the first alarm was activated at 5:52 p.m., indicating that the zone at the northwest motion detector and storage door had been activated. A second alarm was activated at 6:10 p.m. in the same zone. Ms. Ramirez said that since the alarm recycles every 12 minutes, it was possible that the second alarm meant no new activation of the system, but that the system had not been manually disarmed. A third alarm went into the monitoring office two minutes later at 6:12 p.m., but this time the system indicated there was movement in the central hall of the office and in front of the office. There was yet another activation of the system at 6:24 p.m., at the side entry door. At 6:32 p.m., the same door was tripped again.

"Terry Horan, a security technician for the alarm company testified there were two alarm keypads installed in the office, one of which was located at the northwest door. That keypad had been ripped from the wall. Horan was able to determine that the alarm that sounded at 5:52 p.m. was activated either by the motion detector in the secretary's office or the opening of the northwest door. The alarm at 6:12 p.m. was activated by movement in the hall between [the] offices of Brad and Frank St. Clair.

"Crime scene investigation revealed no signs of any forced entry. The blinds at the northwest door had been bent or damaged, and bloodstains were found at the northwest door. St. Clair's pants pockets had been turned inside out and emptied. The office areas were in disarray indicating a possible struggle. There was a tile in the ceiling over the bookkeeper's desk that was slightly out of alignment. There was a shoe track on the bookkeeper's desk directly underneath the dislodged ceiling tile. There were also shoe prints on top of an end table in the secretary's desk. Shoe prints were also found in the dirt area directly outside the front door.

"It was later determined that St. Clair's watch, [P]alm [P]ilot, wedding ring and cell phone were missing, but nothing had been taken from the safe. St. Clair kept a gun in his credenza behind his desk. The gun had not been taken.

"Detective Steve Ramsey was lead investigator on the case. At the scene he asked Arlana St. Clair which of the employees would be the last to leave for the day. Arlana told him that [petitioner] would have been the last person to leave for the day. Officer Ramsey drove to [petitioner's] apartment at around 11:00 p.m. that night. At her apartment were [petitioner], her sister Marlena, Keith Shell, and [petitioner's] daughter. Ramsey testified that he thought his conversation with [petitioner] at her apartment that night was unusual because [petitioner] did not cry or become upset when he informed her of her boss's death.

"Ramsey asked [petitioner] to accompany him to the office building to determine what had been disturbed. [Petitioner] returned to the office as requested.

"At the scene, the officer asked [petitioner] to describe anything that she saw that was out of its normal place. [Petitioner] told the officers that several items had been removed from her desk and put into the trash can. A plant near her desk had been removed from its drip pan, the telephone had not been properly replaced, the blinds were bent, and she noticed that the alarm pad had been removed. Officer Ramsey asked [petitioner] what time

she had left the office. She told him that she normally left at 5:00 p.m., but that day she had left around 5:20 p.m., and had left out of the northwest door. [Petitioner] told the officer that a woman named Christine had come by the office wanting to speak with another employee who was not there that day. [Petitioner] allowed her to use the telephone to speak to that person. They eventually left the office sometime between 5:15[ ]p.m. and 5:20 p.m. [Petitioner] said that when she left, Brad St. Clair was working at his desk in his office. She also told the officer that she did not have a key to the business and did not know the alarm codes. This was confirmed by Arlana St. Clair. The officer also asked [petitioner] if she 'knew anybody that was either mad or upset with Brad or might want to hurt him,' and [petitioner] told him that she did not.

"William Sanders had worked for the property management company as a maintenance person for about four years prior to St. Clair's death. Sanders testified that he had a telephone conversation with St. Clair around 5:11 p.m. that day. During the week after the murder, Sanders had three conversations with [petitioner]. During those conversations they discussed whether [petitioner] was in the office when Sanders spoke with Brad St. Clair that day. [Petitioner] said she did not think she was in the office when he was speaking with St. Clair. They spoke again the next day and they again discussed the murder. They again talked about the time Sanders spoke with St. Clair and this time [petitioner] said she must have been in the office at the time. They spoke again a third time and [petitioner] said she believed she was already gone. Sanders admitted that St. Clair's death was the main topic of conversation around the office for a couple of weeks, and several people speculated about the circumstances of his death.

"On Monday August 7th sometime between 4:30 and 5:00 p[].m., Christine Kearney came by the business to speak with an employee named Amanda Fox-Fredline regarding a personal matter. Apparently Ms. Kearney did not know that Ms. Fox-Fredline did not work in the office on Mondays. [Footnote omitted.] When Kearney went inside the office she saw [petitioner] at her desk and Brad St. Clair at his. [Petitioner] told Ms. Kearney that Ms. Fox-Fredline was not in the office but [petitioner] did call Ms. Fox-Fredline for Ms. Kearney and allowed the two to converse. According to Ms. Kearney, while she was speaking with Fox-Fredline, [petitioner] kept pushing buttons on the telephone, which Ms. Kearney thought was rude. [Footnote omitted.] After Kearney finished her conversation with Fox-Fredline, Kearney left.

"Ms. Fox-Fredline was the bookkeeper for the investment company. She said she received the call from Ms. Kearney at five minutes to 5:00 p.m. and they talked until 5:15 p.m. She admitted that she rushed Ms. Kearney off the phone because she had to leave work at 5:30 p.m.

"On August 12, 2000, [petitioner's] brother Robert told [D]etective Ramsey that on his father's birthday, June 22, 2000, [petitioner] spoke to him about a kidnap plan of her boyfriend Keith Shell. [Petitioner] was at their parents' house when she asked Robert to step outside with her. Robert said [petitioner] told him that she was only asking because Shell had insisted. [Petitioner] told her brother that Shell wanted her to ask him if he wanted to participate in a kidnapping. Shell had been talking about kidnapping one of the older St. Clairs for ransom. [Petitioner] told her brother that the plan was to subdue the older St. Clair with a stun gun. Robert declined and that was the last he heard of the plan. Robert told Detective Ramsey that [petitioner] was not going to be involved in the scheme, but Shell had asked her to talk to Robert about it.

"After St. Clair's death, Robert joked about turning in Keith Shell in order to collect the reward that had been offered. Robert did not know if Shell was involved, only that he might have been involved because of the earlier conversation with [petitioner]. He told the police that the murder might have been a 'botched kidnapping.'

"After Ramsey's conversation with [petitioner's] brother, Ramsey asked [petitioner] to come to the police department. [Petitioner] was given her *Miranda*[2] rights which she waived and gave a taped statement to the officer. [Footnote omitted.]

"Ramsey asked [petitioner] if she had any knowledge of who may have killed St. Clair or if she had anything to do with it. [Petitioner] denied knowing who may have killed St. Clair and said she had nothing to do with his death. After the officer confronted [petitioner] with the fact that he had spoken to Robert, [petitioner] confirmed that Shell had mentioned that he was 'entertaining the idea' of kidnapping someone she worked with. She said she thought Shell had first mentioned the kidnap scheme in February or March 2000. Shell mentioned Robert and asked [petitioner] to speak to her brother about participating. Eventually she did ask Robert. Robert said no.

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2 "*Miranda v. Arizona* (1966) 384 U.S. 436."

"Detective Ramsey stated that [petitioner] told him that when Shell talked about the plan she told Shell that she thought the kidnap plan was a bad idea and that she wanted nothing to do with it. She suggested that Shell get out and get a job since he had not been working. [Petitioner] told the officer that she felt bad about approaching her brother about the plan.

"[Petitioner] told Ramsey that on the day of the killing, Shell had come by the office to give her some papers she needed to mail that day. He came by while Christine Kearney was on the phone with Ms. Fox-Fredline. After Ms. Kearney left, [petitioner] placed the phones on night service, told Brad St. Clair that she was leaving, and left. She and Shell drove over to the home of his friend Darren Choyce, where she dropped him off and she left. Shell came home just before the police arrived.

"The evidence collected at the scene was processed. DNA testing of bloodstains on the door positively excluded [petitioner], Keith Shell and Brad as the source of the blood.

"Fingerprints were lifted from several places in the office. A print was taken from the doorjamb of the bookkeeper's office. It matched the left middle finger of Keith Shell. Shell's left palm print was found on a page of a calendar found in a trashcan. Shell's thumbprint was found on the duct tape wrapped around the victim's head. Shell's palm print was found on the tape removed from St. Clair's ankles.

"Susan Halphin at one time shared a room with [petitioner's] sister Marlena. According to Halphin, sometime in late July 2000, Marlena came into their room and told Halphin not to tell anyone about what Marlena was about to tell her. Halphin testified that Marlena told her that [petitioner] told Marlena that [petitioner] and Shell were planning to kidnap [petitioner's] boss. [Petitioner] told her sister Marlena that Shell did not want to work. [Petitioner] had asked Marlena to help find someone to assist with their plan. Marlena asked Halphin whether Halphin thought Marlena's boyfriend Arnold would help. Halphin's testimony was admitted as impeachment of Marlena, who denied that any such conversation between she and Halphin ever occurred." (*People v. Clevenger* (Dec. 5, 2003, F039853) [nonpub. opn.].)

Petitioner was charged with murder committed with premeditation and while she was engaged in the commission or attempted commission of kidnapping and burglary (Pen. Code,[3] §§ 187, subd. (a), 190.2, subd. (a)(17)(B), (G); count 1), kidnapping for

[3] All statutory references are to the Penal Code.

ransom with death resulting (§ 209, subd. (a); count 2), and conspiracy to commit kidnapping for ransom (§ 182, subd. (a)(1); count 3). At trial, the court instructed the jury on three theories of first degree murder: felony murder during the commission of kidnapping for ransom, felony murder in pursuance of a conspiracy to commit kidnapping for ransom, and premeditated murder. The court instructed on principles of conspiracy and aiding and abetting, including liability for crimes that were natural and probable consequences of the offense that was the object of the conspiracy or that was aided and abetted.[4] The court also instructed on the felony-murder special circumstances of murder in the commission of kidnapping for ransom and murder in the commission of burglary. Jurors were told that with respect to a nonkiller, the special circumstance could not be found true unless that person acted with the intent to kill, or with reckless indifference to human life and as a major participant.

On December 11, 2001, the jury convicted petitioner of first degree murder in the commission of kidnapping, kidnapping for ransom with death resulting, and conspiracy to commit kidnapping for ransom.[5] On January 23, 2002, petitioner was sentenced to life in prison without the possibility of parole (LWOP) on each count, with the terms to be served concurrently. She appealed, claiming (1) the trial court erred by refusing the defense request for a hearing on the scientific validity and reliability of fingerprint identification evidence, (2) the fingerprint identification testimony should have been excluded because it was insufficiently reliable to satisfy the constitutional due process guarantee, (3) the trial court erred by failing to instruct, sua sponte, on the law of accomplice testimony and that such testimony should be viewed with caution, and (4) the

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[4] The prosecutor's theory was that petitioner was liable for the charged offenses as an aider and abettor and/or coconspirator. The prosecutor conceded, in argument to the jury, that witnesses who gave petitioner an alibi for the time of the murder were credible.

[5] The jury returned a "not true" finding on the burglary-murder special circumstance allegation.

evidence was insufficient to prove guilt of conspiracy, murder, and kidnapping for ransom beyond a reasonable doubt. On December 5, 2003, we affirmed the judgment in its entirety. (*People v. Clevenger*, *supra*, F039853.) The California Supreme Court denied review on February 18, 2004, and remittitur issued on February 24, 2004.

On June 2, 2014, the California Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). The court held aiders and abettors cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Id*. at p. 166.)

On July 9, 2015, the California Supreme Court decided *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*). The issue, as framed by the court, was "under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant so as to be statutorily eligible for the death penalty." (*Id*. at p. 794.)

On September 14, 2015, petitioner filed a petition for writ of habeas corpus in Kern County Superior Court, in which she asserted *Banks* rendered her statutorily ineligible to be sentenced to LWOP, and *Chiu* mandated reversal of her first degree murder conviction. After receipt of an informal response, the trial court denied the petition on May 24, 2016.

On July 7, 2016, petitioner filed the instant petition in this court, raising the same claims. On October 27, 2016, after obtaining an informal response, we issued an order to show cause. We subsequently appointed counsel for petitioner, and permitted counsel to file a supplemental petition asserting (1) any forfeiture of a meritorious claim of insufficiency of the evidence with respect to the felony-murder special circumstance constitutes ineffective assistance of appellate counsel, and (2) petitioner's case should be remanded for reconsideration of her sentence, because the trial court mistook the scope of her personal culpability, or, alternatively, because trial and appellate counsel rendered ineffective assistance by not arguing for a lesser sentence. We deemed the order to show cause to include the supplemental petition. After the Attorney General filed a return and

supplemental return and petitioner filed her reply, we requested supplemental briefing regarding what effect, if any, the provisions of Senate Bill No. 1437 (amending §§ 188 & 189, & adding § 1170.95, eff. Jan. 1, 2019) have on petitioner.

DISCUSSION

I

THE SPECIAL FELONY-MURDER CIRCUMSTANCE

Murder committed in the perpetration of, or attempt to perpetrate, kidnapping is deemed by statute to be first degree murder. (Former § 189; see now, § 189, subd. (a).)[6] Subdivision (a)(17) of section 190.2 provides for a penalty of death or LWOP for a defendant found guilty of first degree murder committed "while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, . . . : [¶] . . . [¶] (B) Kidnapping in violation of Section . . . 209 . . . ."

The mere fact a felony enumerated in section 189, subdivision (a) was committed and death resulted is, however, insufficient of itself to establish a felony-murder special circumstance with respect to a person such as petitioner, who aided and abetted the underlying felony but was not the actual killer. Rather, the nonkiller must aid and abet the commission of murder in the first degree with the intent to kill (§ 190.2, subd. (c)), or, lacking intent to kill, must aid and abet the commission of the felony "with reckless indifference to human life and as a major participant . . . ." (*Id.*, subd. (d).)[7]

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[6] Unless otherwise specified, the pertinent statutes have remained unchanged since petitioner committed her offenses in 2000.

[7] Subdivisions (c) and (d) of section 190.2 read, in their entirety: "(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4. [¶] (d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of

Section 190.2, subdivision (d) was enacted in 1990 to bring state law into conformity with prevailing Eighth Amendment doctrine, as set out in the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). (*People v. Estrada* (1995) 11 Cal.4th 568, 575 (*Estrada*); *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298 & fn. 16.)

In *Tison*, two brothers aided an escape by bringing guns into a prison and arming two murderers, one of whom they knew had killed in the course of a previous escape attempt. After the breakout, one of the brothers flagged down a passing car, and both fully participated in kidnapping and robbing the vehicle's occupants. Both then stood by and watched as those people were killed. The brothers made no attempt to assist the victims before, during, or after the shooting, but instead chose to assist the killers in their continuing criminal endeavors. (*Tison*, *supra*, 481 U.S. at pp. 151-152.) The Supreme Court held the brothers could be sentenced to death despite the fact they had not actually committed the killings themselves or intended to kill, stating: "[R]eckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result. [¶] The [brothers'] own personal involvement in the crimes was not minor, but rather, . . . 'substantial.' Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each . . . was actively involved in every element of the kidnap[p]ing-robbery and was physically present during the entire sequence of criminal activity culminating in

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subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

the murder[s] . . . and the subsequent flight. The Tisons' high level of participation in these crimes . . . implicates them in the resulting deaths." (*Id*. at pp. 157-158.)

The *Tison* court pointed to the defendant in *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*) as an example of a nonkiller convicted of murder under the felony-murder rule for whom the death penalty was unconstitutionally disproportionate. Enmund was the driver of the getaway car in an armed robbery of a dwelling whose occupants were killed by Enmund's accomplices when they resisted. (*Id*. at pp. 783-784; see *Tison*, *supra*, 481 U.S. at p. 146.) In deciding the Eighth Amendment to the United States Constitution forbids imposition of the death penalty "on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" (*Enmund, supra*, at p. 797), the high court emphasized that the focus had to be on the culpability of Enmund himself, and not on those who committed the robbery and shot the victims (*id*. at p. 798). "Enmund himself did not kill or attempt to kill; and, . . . the record . . . does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. . . . [T]hus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment." (*Ibid*.)

In *Tison*, the United States Supreme Court acknowledged that the Tison brothers likewise did not intend to kill, and so they did not "fall within the 'intent to kill' category of felony murderers for which *Enmund*" found the death penalty permissible. (*Tison, supra*, 481 U.S. at p. 151.) The court found it "equally clear," however, that the pair also fell outside the category of felony murderers for whom *Enmund* found the death penalty disproportional (*Tison*, *supra*, at p. 151): The facts shown by the record "not only indicate[d] that the Tison brothers' participation in the crime was anything but minor;

they also . . . clearly support[ed] a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life." (*Id*. at p. 152.)

The high court observed: "Although we state these two requirements [major participation in the felony committed and reckless indifference to human life] separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." (*Tison, supra*, 481 U.S. at p. 158, fn. 12.)

In *Estrada, supra*, 11 Cal.4th 568, the California Supreme Court read *Tison* to "instruct[] that the culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death' [citation]," and, so "ascribe[d that meaning] to the statutory phrase" in subdivision (d) of section 190.2. (*Estrada, supra,* at p. 577.) The court concluded "the generally accepted meaning of the phrase, 'reckless indifference to human life,' in common parlance amply conveys to the jury the requirement of a defendant's subjective awareness of the grave risk to human life created by his or her participation in the underlying felony." (*Id*. at p. 578.)[8]

In *Banks, supra*, 61 Cal.4th 788, Matthews was convicted of first degree murder with a felony-murder special circumstance based on his having acted as the getaway driver for an armed robbery in which Banks and others participated, and in which Banks

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[8] Although the California Supreme Court determined in *Estrada* that trial courts have no sua sponte duty to explain the phrase "reckless indifference to human life" to the jury (*Estrada, supra*, 11 Cal.4th at p. 581), petitioner's jury was told, pursuant to CALJIC No. 8.80.1 (1997 rev.) (6th ed. 1996), that "a defendant acts with reckless indifference to human life when that defendant knows or is aware that his or her acts involve a grave risk of death to an innocent human being."

shot and killed one of the robbery victims while escaping. (*Id*. at pp. 794, 797.) Matthews was sentenced to LWOP. (*Id*. at p. 797.) The Court of Appeal rejected his challenge to the sufficiency of the evidence supporting the special circumstance finding, and concluded his actions as a getaway driver for the underlying robbery, with knowledge death was always a possibility in an armed robbery, were legally sufficient under section 190.2, subdivision (d). The California Supreme Court granted review to address the "proper construction" of that statute (*Banks*, *supra*, at p. 797), and concluded the evidence was "insufficient as a matter of law to support the special circumstance," making Matthews "statutorily ineligible" for LWOP (*id*. at p. 794).

In reaching this conclusion, the state Supreme Court agreed with *People v. Proby* (1998) 60 Cal.App.4th 922, 933 (*Proby*), that the phrase "major participant" does not have a specialized or technical meaning. (*Banks*, *supra*, 61 Cal.4th at pp. 800-801.)[9] It observed, however, that "rephrasing *Tison*'s dictates in essentially synonymous words takes us only so far. To gain a deeper understanding of the governing test and offer further guidance," it turned to a close examination of *Enmund* and *Tison*. (*Banks*, *supra*, at p. 801.) It stated:

> "The two cases embrace the United States Supreme Court's long-standing recognition that, in capital cases above all, punishment must accord with individual culpability. . . . A sentencing body must examine the defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime. [Citations.]
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> "With respect to the mental aspect of culpability, *Tison*, and in turn section 190.2[, subdivision](d), look to whether a defendant has ' "knowingly engag[ed] in criminal activities known to carry a grave risk of death." ' [Citation.] The defendant must be aware of and willingly

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9 *Proby* observed that "[t]he common meaning of 'major' includes 'notable or conspicuous in effect or scope' and 'one of the larger or more important members or units of a kind or group.' [Citation.]" (*Proby*, *supra*, 60 Cal.App.4th at pp. 933-934.) At petitioner's request, the trial court gave a special instruction to this effect.

involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create. . . .

"With respect to conduct, *Tison* and *Enmund* establish that a defendant's personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder such as Earl Enmund. The defendants' actions in *Tison* [citation] and *Enmund* [citation] represent points on a continuum. [Citation.] Somewhere between them, at conduct less egregious than the Tisons' but more culpable than Earl Enmund's, lies the constitutional minimum for death eligibility. . . . [¶] . . . [¶]

"Among those factors that distinguish the Tisons from Enmund, and thus may play a role in determining whether a defendant's culpability is sufficient to make him or her death eligible, are these: What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major' [citations].

"The People propose we treat as a major participant . . . anyone 'whose conduct involves the intentional assumption of some responsibility for the completion of the crime regardless of whether the crime is ultimately successful. As such, participation in planning with the intent of facilitating the commission of the crime, or participating in conduct integral to or for the purpose of facilitating the commission of the crime, constitutes major participation.' This test cannot be reconciled with the holdings of *Tison* and *Enmund*. Requiring only 'the intentional assumption of some responsibility for the completion of the crime' would sweep in essentially every felony murderer — indeed, even Earl Enmund himself — whether an actual killer or not. Doing so would violate the Supreme Court's requirement that each felony murderer's culpability be considered individually and disregard the court's corresponding recognition that, for

many nonkillers, death is disproportionate to that individual's culpability and thus unconstitutional.

"Finally, we note the standards we articulate, although developed in death penalty cases, apply equally to cases like this one involving statutory eligibility under section 190.2[, subdivision](d) for life imprisonment without parole. As a purely constitutional matter, nothing would foreclose California from imposing life imprisonment without parole sentences on felony murderers with Matthews's degree of culpability. [Citations.] Section 190.2[, subdivision](d) does not, however, extend eligibility for life imprisonment without parole to every defendant exhibiting the constitutionally minimum degree of culpability for that sentence. Instead, by importing the *Tison-Enmund* standard, it permits such a sentence only for those felons who constitutionally could also be subjected to the more severe punishment, death. As a matter of state statute, then, the *Tison-Enmund* standard is 'applicable to *all* allegations of a felony-murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without parole.' [Citation.] Accordingly, the considerations that informed the Supreme Court's distinctions between different levels of culpability in *Tison v. Arizona* [citation] should guide juries faced with making those same distinctions under section 190.2[, subdivision](d)." (*Banks, supra*, 61 Cal.4th at pp. 801-804, fn. omitted.)

The state high court concluded the record evidence placed Matthews at the *Enmund* pole of the *Tison-Enmund* spectrum. (*Banks, supra*, 61 Cal.4th at p. 805.) Because he was "no more than a getaway driver, guilty like Earl Enmund of 'felony murder *simpliciter*' [citations] but nothing greater," he was ineligible for the death penalty under *Tison* and *Enmund*. (*Banks, supra*, at p. 805.) Since the evidence was insufficient to make him death eligible under those cases, it was also insufficient to sustain a true finding as to the special circumstance and make Matthews eligible for LWOP under state law. (*Ibid.*)

The court further found Matthews lacked the mens rea necessary to make him legally eligible for a sentence of LWOP. (*Banks, supra*, 61 Cal.4th at p. 807.) It explained:

"Reckless indifference to human life 'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death." ' [Citation.] There was evidence from which the jury

could infer Matthews knew he was participating in an armed robbery. But nothing at trial supported the conclusion beyond a reasonable doubt that Matthews knew his own actions would involve a grave risk of death. There was no evidence Matthews intended to kill or, unlike the Tisons, knowingly conspired with accomplices known to have killed before. Instead, as in *Enmund*, Banks's killing of [the victim] was apparently a spontaneous response to armed resistance from the victim.

"The Court of Appeal, in a line of reasoning endorsed by the People, concluded that '[w]ith advance knowledge of the planned robbery and burglary, Matthews had to be aware of the risk of resistance and the extreme likelihood that death could result.' According to the appellate court, Matthews's confederates surely 'anticipated as much because they were armed,' and although Matthews was not armed, the jury could readily infer Matthews knew his confederates were.

"The problem with the sufficiency of such evidence to prove reckless indifference to human life is that *Enmund* and *Tison* deem identical evidence inadequate. . . .

". . . Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum. [Citation.] [¶] . . . [¶]

"Alternatively, the People highlight the United States Supreme Court's recognition that 'there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life.' [Citation.] They argue each crime listed in [former] section 189 [now § 189, subd. (a)] qualifies and thus Matthews, because he participated in two such crimes, robbery and burglary, has automatically exhibited reckless indifference to human life.

"Section 189[, subdivision (a)] codifies the first degree felony-murder rule [citation]; participation in the crimes it lists subjects one to liability for first degree murder. To make participation in such crimes also sufficient, without more, to establish categorically reckless indifference to human life would collapse the *Tison* inquiry into the felony-murder inquiry and treat all felony murderers as equally culpable and eligible for death. But the central holding of *Enmund*, and *Tison* after it, was that for purposes of the death penalty, not all felony murderers are equally culpable and eligible for death. The People's position embraces the very punishment — death eligibility for participation in felony murder *simpliciter* — the Supreme Court has declared unconstitutional. [Citations.]

> "That one may infer the felonies listed in section 189[, subdivision (a)] are those the Legislature views as 'inherently dangerous' [citation] does not change the analysis. Whether a category of crimes is sufficiently dangerous to warrant felony-murder treatment, and whether an individual participant has acted with reckless indifference to human life, are different inquires. Section 189[, subdivision (a)] cannot be read as attempting to conflate them, and in any event under *Enmund* and *Tison* it would be impermissible for a state legislature to declare all participation in broad classes of felony murders, such as burglaries or robberies, punishable by death without further inquiry into each individual defendant's mental state. [Citations.][**10]**" (*Banks*, *supra*, 61 Cal.4th at pp. 807-810, fns. omitted.)

In *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), Clark was convicted, inter alia, of first degree murder, and robbery-murder and burglary-murder special circumstances were found true, based on his liability as an aider and abettor to an accomplice's fatal shooting of a victim during an attempt to rob a CompUSA store. There was no evidence Clark himself intended to kill the victim. On appeal, Clark claimed the evidence was insufficient to establish that he was a major participant in the CompUSA crimes and that he acted with reckless indifference to human life. (*Id.* at pp. 610-611.)

With respect to the major participant prong, the high court considered the relevant factors laid out in *Banks*, and concluded Clark had a prominent role in planning the criminal enterprise that led to the victim's death; however, there was no evidence about his role in supplying the weapon (although an inference could be drawn that use of a weapon was part of his plan for the robbery), his awareness of the particular dangers posed by the crime, or his awareness of the past experience or conduct of the shooter. The court noted that although Clark was in the area during the robbery, he was not in the

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10 "*Tison* does not specify those few felonies for which any major participation would 'necessarily exhibit[] reckless indifference to the value of human life.' [Citation.] One could surmise a partial list of crimes the United States Supreme Court might agree on — say, the manufacture and planting of a live bomb. But we need not speculate. Even the Tisons' prison break of two convicted murderers was remanded, rather than treated as per se demonstrating the requisite reckless indifference. Plainly, armed robbery does not qualify. [Citation.]"

immediate area of the shooting. (*Clark, supra*, 63 Cal.4th. at pp. 613-614.) The court recognized there might be some question concerning the amount of culpability that should be assessed for a planner of a felony leading to a murder who was not present during the immediate circumstances leading to the murder, but concluded it did not need to decide whether Clark was a major participant under the circumstances of the case since the evidence was insufficient to show he exhibited reckless indifference to human life. (*Id*. at p. 614.)

As to that prong, the state high court examined *Tison* and *Banks*, and reiterated *Banks*'s rejection of the argument any defendant involved in a felony enumerated in former section 189 (now § 189, subd. (a)) automatically exhibited reckless indifference to human life. (*Clark, supra*, 63 Cal.4th at p. 616; see *Banks, supra*, 61 Cal.4th at pp. 809-810.) It further stated:

> "*Tison* held that the necessary mens rea for death eligibility may be 'implicit in knowingly engaging in criminal activities known to carry a grave risk of death.' [Citation.] As examples, the high court cited 'the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property,' and . . . 'the person who tortures another not caring whether the victim lives or dies' as two examples of such murderers. [Citation.] Notably, both examples involve a defendant who personally killed the victim — not, as in this case, *Enmund*, *Tison*, or *Banks*, a vicariously liable defendant who was not the actual killer. Nevertheless, these examples provide some indication of the high court's view of 'reckless indifference,' namely, that it encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions.
>
> "The Model Penal Code generally defines acting recklessly as follows: 'A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its

> disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' [Citation.]
>
> "This definition encompasses both subjective and objective elements. The subjective element is the defendant's conscious disregard of risks known to him or her. . . . [R]ecklessness is also determined by an objective standard, namely what 'a law-abiding person would observe in the actor's situation.' [Citation.] . . . .
>
> "Finally, while the fact that a robbery involves a gun is a factor beyond the bare statutory requirements for first degree robbery felony murder, this mere fact, on its own and with nothing more presented, is not sufficient to support a finding of reckless indifference to human life for the felony-murder aider and abettor special circumstance. [Citation.]" (*Clark, supra*, 63 Cal.4th at pp. 616-617, fns. omitted.)

To determine whether there was substantial evidence Clark exhibited reckless indifference to human life within the meaning of section 190.2, subdivision (d), the Supreme Court considered "the specific facts of Clark's case in light of some of the case-specific factors that this court and other state appellate courts have considered in upholding a determination of reckless indifference to human life in cases involving nonshooter aiders and abettors to commercial armed robbery felony murders." (*Clark, supra*, 63 Cal.4th at p. 618.) As in *Banks*, the court found no one factor was necessary or necessarily sufficient. (*Clark*, *supra*, at p. 618; see *Banks*, *supra*, 61 Cal.4th at p. 803.)

The first consideration was the defendant's knowledge of weapons, and use and number of weapons. The court noted that the mere fact of a defendant's awareness that a gun would be used in the felony was insufficient to establish reckless indifference to human life, but on the other hand, it was significant in *Tison* that the brothers brought an arsenal of weapons into the prison and guarded the victims. The court also found that a defendant's use of a firearm, even if the defendant did not kill the victim, could be significant. (*Clark, supra*, 63 Cal.4th at p. 618.) In Clark's case, the evidence showed only that there was one gun at the scene of the killing, it was carried by someone other than Clark, and it had been loaded with only one bullet. (*Id*. at p. 619.)

The next factor was the defendant's physical presence at the scene and opportunities to restrain the crime and/or aid the victim. The court stated: "Proximity to the murder and the events leading up to it may be particularly significant where, as in *Tison*, the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force. In such cases, 'the defendant's presence allows him to observe his cohorts so that it is fair to conclude that he shared in their actions and mental state. . . . [Moreover,] the defendant's presence gives him an opportunity to act as a restraining influence on murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murders.' [Citation.]" (*Clark*, *supra*, 63 Cal.4th at p. 619.) The court cautioned, however, that physical presence was not invariably a prerequisite to a finding of reckless indifference. "Where, for example, a defendant instructs other members of a criminal gang carrying out carjackings at his behest to shoot any resisting victims, he need not be present when his subordinates carry out the instruction in order to be found to be recklessly indifferent to the lives of the victims. [Citation.]" (*Ibid*.) In Clark's case, Clark was waiting across the parking lot for a cohort to secure the store, when the cohort shot the victim. There was no evidence Clark instructed the shooter to use lethal force, had an opportunity to observe the shooter's response to the victim's unanticipated appearance, or to intervene to prevent the killing. (*Id*. at pp. 619-620.)

The court next examined the duration of the felony. The court explained: "Where a victim is held at gunpoint, kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence' [citation], possibly culminating in murder. The duration of the interaction between victims and perpetrators is therefore one consideration in assessing whether a defendant was recklessly indifferent to human life." (*Clark*, *supra*, 63 Cal.4th at p. 620.) In Clark's case, the robbery was planned for after closing time, when most store

employees would be gone. Although Clark anticipated some employees would be present, the plan was to handcuff them in a bathroom, while the robbery itself took place elsewhere in the store. Thus, the period of interaction between perpetrators and victims was designed to be limited, although, because the robbery was to occur in a public space over a substantial duration, it did involve the risk of interlopers, such as the victim, happening upon the scene. (*Id.* at pp. 620-621.)

Another factor was the defendant's knowledge of a cohort's likelihood of killing. The court stated: "A defendant's knowledge of factors bearing on a cohort's likelihood of killing are [*sic*] significant to the analysis of reckless indifference to human life. Defendant's knowledge of such factors may be evident before the felony or may occur during the felony. . . . [¶] . . . A defendant's willingness to engage in an armed robbery with individuals known to him to use lethal force may give rise to the inference that the defendant disregarded a 'grave risk of death.' [Citation.]" (*Clark, supra*, 63 Cal.4th at p. 621.) In Clark's case, no evidence was presented that the shooter was known to have a propensity for violence, let alone that Clark was aware of such a propensity. Nor was Clark in a position to observe anything in the shooter's actions just before the killing that would have indicated the shooter was likely to engage in lethal violence. (*Ibid.*)

The final factor considered by the court was the defendant's efforts to minimize the risks of violence during the felony. Clark argued his efforts in this regard should be taken into account, as the robbery was undertaken after closing time, when most of the employees were gone; there were not supposed to be any bullets in the gun; and the gun had only been loaded with one bullet. (*Clark, supra,* 63 Cal.4th at pp. 621-622.) The state Supreme Court found this factor relevant but not dispositive, due to "the two-part nature of the mens rea analysis for recklessness under *Tison* and section 190.2, subdivision (d)." (*Id.* at p. 622.) The court explained: "[R]ecklessness . . . implicates both subjective and objective elements for the offense. . . . [E]vidence of any effort by defendant to minimize the risks of violence could possibly be sufficient to rebut a

conclusion of defendant's subjective awareness of engaging in activities risky to human life. But . . . , although the presence of some degree of defendant's subjective awareness of taking a risk is required, it is the jury's objective determination that ultimately determines recklessness. Therefore, it would be possible for the defendant to have engaged in apparent efforts to minimize the risk of violence but still be determined by the jury to have been reckless, given all the circumstances known to defendant surrounding the crime." (*Ibid*.) Accordingly, the court concluded that a defendant's good faith but unreasonable belief that he or she was not posing a risk to human life did not foreclose a determination of reckless indifference to human life. (*Ibid*.)

Although it ultimately upheld Clark's death sentence for reasons not pertinent here, the California Supreme Court vacated the robbery-murder and burglary-murder special circumstance findings. The court found insufficient evidence to support the inference Clark was recklessly indifferent to human life. (*Clark*, *supra*, 63 Cal.4th at pp. 623-624.)

From the evidence presented at petitioner's trial, jurors reasonably could have inferred petitioner and Keith Shell planned the kidnapping together, and that the planning took place over a period of time. Petitioner was the one who knew the building's layout, the location of the victim's office, and when the victim would be alone in the building. Jurors could also have inferred petitioner tried to get Kearney to leave quickly after Kearney showed up unexpectedly. From the absence of evidence of forced entry, jurors reasonably could have inferred petitioner let Shell and his accomplice(s) into the building to carry out the kidnapping plan. The fact petitioner attempted to procure someone to assist Shell in carrying out the plan, as well as her anticipation a stun gun would be used to subdue the victim, reasonably suggest she was aware force likely would have to be used to restrain the victim. In addition, she covered for Shell after learning the victim was killed. On the other hand, there was no evidence petitioner intended for the victim to be killed or even anticipated potentially lethal violence might be involved in the crime,

no evidence Shell or his accomplice(s) had a propensity for violence or that petitioner had experience with Shell that suggested he might be violent, and petitioner was not present at the scene at a time when she was in a position to facilitate or prevent the murder.

We need not determine whether the foregoing evidence is sufficient to sustain a finding petitioner was a major participant in the kidnapping, although we believe a strong argument can be made that she was. In order to sustain the jury's true finding on the felony-murder special circumstance, the evidence must also show petitioner acted with reckless indifference to human life. It does not.

"To determine whether the evidence supports a special circumstance finding, we must review ' "the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find" ' the special circumstance allegation true ' "beyond a reasonable doubt." ' [Citation.]" (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1028.)

Although kidnapping for ransom, as proscribed by section 209, subdivision (a), does not require forced movement of the victim (*People v. Rayford* (1994) 9 Cal.4th 1, 12, fn. 8, disapproved on another ground in *People v. Acosta* (2002) 29 Cal.4th 105, 120, fn. 7), the offense nevertheless carries a high probability death will result, and so is inherently dangerous to human life (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1228). As the California Supreme Court has made clear, however, participation — even major participation — in such a felony is insufficient, without more, to demonstrate reckless indifference to human life. (*Banks*, *supra*, 61 Cal.4th at p. 810.) Here, no reasonable juror could have found subjective or objective recklessness, where there was no evidence petitioner had reason to believe Shell or his accomplice(s) might resort to lethal force or that she contemplated the use of any weapon other than a stun gun, and petitioner almost certainly was not present at the time of the killing. Considering all the evidence, "there appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any" kidnapping for ransom. (*Clark*,

supra, 63 Cal.4th at p. 623; see *In re Miller* (2017) 14 Cal.App.5th 960, 975-977 (*Miller*).)

United States Supreme Court cases suggest that court views reckless indifference as "encompass[ing] a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark*, *supra*, 63 Cal.4th at p. 617.) We see no evidence of such willingness here. The Attorney General disagrees, asserting: "[W]hile there was no evidence that petitioner knew of any prior violent conduct by Shell, his desperation for money was a driving force behind the plan. The jury learned that petitioner and Shell's financial situation was a source of great tension in their relationship. Petitioner had a young daughter, and she was pregnant with Shell's child. Shell had been out of work for several months, and he did not want to seek employment or work anymore. Petitioner was the sole financial support for their family. It is reasonable to conclude from the totality of the evidence that petitioner knew Shell would have done anything to execute the plan or, alternatively, to have done anything to avoid being caught." (Record citations omitted.)

In our view, the conclusion drawn by the Attorney General is merely speculative. It does not follow, from evidence of financial difficulties and resulting tensions, that a person who has no reason to know her cohort might be violent would know he would turn lethally violent if necessary to achieve a goal, whether it be to execute a plan or avoid detection. To be relied upon in a determination whether evidence is substantial, an inference "must be reasonable. An inference is not reasonable if it is based only on speculation. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 669.) Similarly, a reasonable inference may not be based on mere suspicion, imagination, supposition, surmise, conjecture, or guesswork. (*People v. Davis* (2013) 57 Cal.4th 353, 360.) " '[S]peculation is not evidence, less still substantial evidence.' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 735.)

Because the evidence is insufficient to sustain the jury's true finding on count 1's special circumstance, that finding must be vacated. Retrial of the special circumstance allegation is barred. (*People v. Lewis* (2008) 43 Cal.4th 415, 509, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 918-920; *People v. Perez* (2016) 243 Cal.App.4th 863, 882.)

In reaching this conclusion, we necessarily reject the Attorney General's procedural arguments for barring relief.

The Attorney General first claims *Banks* (and, by extension, *Clark*) is not retroactive to final judgments, because it neither created new law nor overruled existing California Supreme Court precedent. The nonretroactivity claim was considered and rejected in *Miller*, *supra*, 14 Cal.App.5th at pages 977 through 978. We agree with that court, which stated:

> "We begin with an overarching, dispositive point: Federal due process guarantees require reversal of the special circumstance finding in this case regardless of the Attorney General's California-law-based procedural arguments. That much is clear from the United States Supreme Court's decision in *Fiore v. White* (2001) 531 U.S. 225 (*Fiore*). There, the high court considered whether Fiore was entitled to habeas corpus relief when — after his conviction — the Pennsylvania Supreme Court interpreted the relevant penal statute in a manner that made clear Fiore's conduct was not within its scope. (*Id*. at p. 226.) In response to a certified question from the high court, the Pennsylvania Supreme Court stated its interpretation of the statute ' "did not announce a new rule of law" ' but rather ' "merely clarified the plain language of the statute." ' (*Id*. at p. 228.) With that answer in hand, the United States Supreme Court recognized Fiore's case 'present[ed] no issue of retroactivity' and instead raised only the question of 'whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit.' (*Ibid*.)
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> "The high court's answer, unanimously, was 'no.' The court held 'the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.' (*Fiore*, *supra*, 531 U.S. at pp. 228-229, citing *Jackson v. Virginia* (1979) 443 U.S. 307 and *In re Winship* (1970) 397 U.S.

358.) Thus, in *Fiore*'s words, '[t]he simple, inevitable conclusion is that Fiore's conviction fails to satisfy the Federal Constitution's demands.' (*Fiore*, *supra*, at p. 229.)

"The parallels to our case are exact, and the result must be identical. Like the Pennsylvania Supreme Court's opinion at issue in *Fiore*, our Supreme Court's opinions in *Banks* and *Clark* merely clarified the meaning of section 190.2 — *Banks* and *Clark* merely clarified the 'major participant' and 'reckless indifference to human life' principles that existed when defendant's conviction became final. [Citation.] The federal Constitution therefore requires reversal of the special circumstance finding against defendant, and the Attorney General's procedural arguments can be no match for the United States Constitution's demands." (See *In re Bennett* (2018) 26 Cal.App.5th 1002, 1006-1007, 1026-1027 [granting habeas petition based on insufficient evidence of special circumstance, under *Banks* and *Clark*, without discussion of retroactivity]; *In re Loza* (2017) 10 Cal.App.5th 38, 41, 55 [finding no need to discuss asserted procedural bars where sufficient evidence of special circumstance found under *Banks* and *Clark*].)

Next, the Attorney General invokes the rule of *In re Lindley* (1947) 29 Cal.2d 709, 723, which generally precludes using habeas corpus as a means of retrying issues of fact or reviewing routine claims the evidence presented at trial was insufficient. (*In re Reno* (2012) 55 Cal.4th 428, 505.) Petitioner's claim is not, however, a "routine" claim of insufficient evidence as described in *Lindley*. It does not involve retrying issues of fact, but rather the application of law to established facts. (See *Miller*, *supra*, 14 Cal.App.5th at pp. 979-980.) Accordingly, it falls outside *Lindley*'s limitation. (See *In re Harris* (1993) 5 Cal.4th 813, 840-841; *In re Zerbe* (1964) 60 Cal.2d 666, 667-668.)

The Attorney General next contends petitioner's claim is barred by *In re Dixon* (1953) 41 Cal.2d 756, 759, which holds: "The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction. [Citations.]" Petitioner says this rule — which merely states a discretionary policy (*In re Black* (1967) 66 Cal.2d 881, 887) — does not apply because

appellate counsel rendered ineffective assistance by failing to raise the claim on direct appeal. We agree.

"A criminal defendant is entitled to effective assistance of counsel on appeal, and such a claim is cognizable in a habeas corpus proceeding. [Citation.] Appellate counsel has the duty to brief all arguable issues. [Citations.] The question of ineffective assistance of appellate counsel must be decided on a case-by-case basis and will depend on whether counsel failed to raise assignments of error that were crucial in the context of the particular circumstances at hand. The inexcusable failure to raise crucial assignments of error deprives petitioner of the effective assistance of appellate counsel. [Citation.]" (*In re Jones* (1994) 27 Cal.App.4th 1032, 1040-1041; see *In re Spears* (1984) 157 Cal.App.3d 1203, 1208-1209.)

A claim of ineffective assistance of appellate counsel has two prongs: (1) a showing counsel was objectively unreasonable in failing to raise a particular issue on appeal, and (2) a showing of prejudice, i.e., a reasonable probability that, but for counsel's unreasonable failure to raise an issue, the petitioner would have prevailed on his or her appeal. (See *Smith v. Robbins* (2000) 528 U.S. 259, 285.) "Appellate lawyers are not required to present every nonfrivolous claim on behalf of their clients — such a requirement would serve to bury strong arguments in weak ones — but they *are* expected to 'select[] the most promising issues for review.' [Citation.] For this reason, if [appellate counsel] abandoned a nonfrivolous claim that was both 'obvious' and 'clearly stronger' than the claim that [s]he actually presented, [her] performance was deficient, unless [her] choice had a strategic justification." (*Shaw v. Wilson* (7th Cir. 2013) 721 F.3d 908, 915; see *Smith v. Robbins, supra*, 528 U.S. at p. 288.) " '[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' [Citation.]" (*Smith v. Murray* (1986) 477 U.S. 527, 536.)

A claim the evidence was insufficient, under *Enmund*, *Tison*, and *Estrada*, to sustain the special circumstance finding clearly was stronger than the claims appellate counsel actually presented on petitioner's behalf. This is particularly true with respect to the claims of insufficient evidence counsel did present, one of which we paraphrased in our opinion as " 'I did not agree with Keith Shell to commit a kidnapping for ransom, I just agreed to (and did) help him commit a kidnapping for ransom.' " (*People v. Clevenger*, *supra*, F039853.) The claim also would have been obvious at the time of petitioner's direct appeal, since it was one of the grounds upon which defense counsel moved for a new trial. (See *Shaw v. Wilson*, *supra*, 721 F.3d at p. 916.) As the claim was meritorious and would have resulted in the special circumstance being vacated and a lesser sentence imposed on count 1, petitioner was prejudiced by appellate counsel's failure to raise the issue, and there can be no reasonable tactical excuse for counsel's failure to do so. Accordingly, we reject the notion petitioner's claim is barred because it could and should have been raised on direct appeal.

Last, the Attorney General argues petitioner's claim is untimely. "A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner." (*In re Reno*, *supra*, 55 Cal.4th at p. 459.) "For noncapital cases in California, there is no express time window in which a petitioner must seek habeas corpus relief. [Citation.] Rather, the general rule is that the petition must be filed 'as promptly as the circumstances allow . . . .' [Citation.]" (*In re Douglas* (2011) 200 Cal.App.4th 236, 242.) "Delay is measured from the time a petitioner knew, or reasonably should have known, the information in support of the claim *and the legal basis for the claim* [citation], beginning as early as the date of conviction [citation]." (*In re Nuñez* (2009) 173 Cal.App.4th 709, 723.)

"An untimely petition for writ of habeas corpus may still be considered if the delay is justified by the petitioner, who bears the burden of demonstrating either: '(i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls

within an exception to the bar of untimeliness.' [Citation.]" (*In re Douglas*, *supra*, 200 Cal.App.4th at pp. 242-243.) The four narrow exceptions that have been recognized by the California Supreme Court are: " '(i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute.' [Citation.]" (*In re Reno*, *supra*, 55 Cal.4th at p. 460.)

Petitioner sought habeas relief in the trial court approximately two months after *Banks* was decided. She filed the instant petition in this court approximately two months after the trial court denied her petition. In neither instance do we find substantial delay. With respect to delay in raising the claim of insufficient evidence, we find good cause. Although the claim was available at the time of petitioner's direct appeal, petitioner was entitled to rely on appellate counsel's judgment concerning what claims were viable at that time. Unfortunately, as we have explained, appellate counsel's performance fell below constitutionally adequate standards. We do not believe petitioner reasonably should have known this fact, however, until *Banks* was decided. Accordingly, we find good cause for the delay between conviction and the filing of a petition in the trial court. Moreover, "[a] writ of habeas corpus 'will always issue to review an invalid sentence, when, without the redetermination of any facts, the judgment may be corrected to accord with the proper determination of the circumstances. [Citations.]' [Citation.] When the question raised in a petition for writ of habeas corpus 'is one of excessive punishment, it is a proper matter for us to consider on a writ of habeas corpus, despite [the petitioner's]

delay. [Citation.]' " (*People v. Miller* (1992) 6 Cal.App.4th 873, 877; accord, *In re Nuñez, supra*, 173 Cal.App.4th at p. 724.)

II

THE MURDER CONVICTION

In *Chiu, supra*, 59 Cal.4th 155, the California Supreme Court held that an aider and abettor cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Id.* at pp. 165-166.) In *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356-1357 (*Rivera*), the Court of Appeal extended *Chiu*'s reasoning and holding to coconspirator liability under the natural and probable consequences doctrine.

Chiu's holding, while retroactively applicable to convictions that have become final on direct appeal (*In re Martinez* (2017) 3 Cal.5th 1216, 1222), does not affect or limit an aider and abettor's liability for first degree felony murder (*Chiu, supra*, 59 Cal.4th at p. 166; see *People v. Romero and Self* (2015) 62 Cal.4th 1, 41). Nevertheless, the parties appear to agree petitioner's jury could have convicted her based on a theory that violated *Chiu* and/or *Rivera*. Accordingly, we turn to the issue of prejudice.

"[O]n a petition for writ of habeas corpus, as on direct appeal, *Chiu* error requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder." (*In re Martinez, supra*, 3 Cal.5th at p. 1218; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130.) We can so conclude here: The jury's true finding on the kidnap-murder special circumstance leaves no reasonable doubt it convicted petitioner of first degree murder under a felony-murder theory, which theory of liability was not affected by *Chiu*. (See, e.g., *In re Martinez, supra*, 3 Cal.5th at p. 1226; *People v. Chun* (2009) 45 Cal.4th 1172, 1205; *People v. Hovarter* (2008) 44 Cal.4th 983, 1018-1019.)

In her reply to the Attorney General's return to the petition for writ of habeas corpus, petitioner conceded she was not prejudiced by the instructional error. We

subsequently requested supplemental briefing on the effect, if any, of Senate Bill No. 1437 on petitioner. In response, petitioner withdrew her concession, arguing that under the new law, her felony-murder conviction is invalid, and so the instructional error cannot be found harmless.

In enacting Senate Bill No. 1437, which went into effect on January 1, 2019, the Legislature found and declared, in part, that "[a] person's culpability for murder must be premised upon that person's own actions and subjective mens rea." (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) uncod. § 1, subd. (g).) Insofar as is pertinent, the bill amended section 188 to provide that, except as stated in subdivision (e) of section 189, a principal in a crime must act with malice aforethought, and that malice shall not be imputed to a person based solely on his or her participation in a crime. (§ 188, subd. (a)(3).) The bill added subdivision (e) to section 189. That subdivision provides: "(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [including kidnapping] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

In light of our conclusion the evidence presented at trial was insufficient to establish petitioner acted with reckless indifference to human life, it appears petitioner could not be held liable for murder under newly amended section 189. At the time of her offenses, however, liability for felony murder extended to anyone who "knowingly and purposefully participate[d] in the underlying felony . . . ." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1159.) Thus, the felony-murder theory under which petitioner was convicted was valid at the time of her conviction. (Cf. *People v. Morgan* (2007) 42

Cal.4th 593, 611-613 [reversal required where one of prosecutor's theories was legally inadequate at time of offense, though change in law made it legally adequate at time of trial].) Even assuming petitioner could not be tried on a felony-murder theory if her offenses took place today, the record still leaves no reasonable doubt the jury convicted her on a theory that was not affected by *Chiu* and/or *Rivera*. Accordingly, she is not entitled to reversal of her murder conviction as part of our disposition of her petition for writ of habeas corpus.

III

RECONSIDERATION OF SENTENCE

Petitioner asserts that upon vacating the special circumstance as to count 1, we should remand her case to the trial court for reconsideration of the overall sentence, rather than merely remanding for resentencing on that count. She argues the trial court mistook the scope of her personal culpability; since all three counts were interconnected crimes, it would be "incongruous" for her not to be subject to LWOP on the murder count while still having an LWOP sentence on the felony underlying the murder conviction; and a remand would give her the opportunity to argue an LWOP sentence on counts 2 and 3 violates the constitutional proscriptions against cruel and/or unusual punishment, or that those counts should be reduced under section 1385.

We decline to remand the matter for reconsideration of the overall sentence. Section 1484 "contemplates that a court, faced with a meritorious petition for a writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy." (*In re Harris*, *supra*, 5 Cal.4th at p. 851.)[11]

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11 Section 1484 provides that after a party files his or her petition for writ of habeas corpus, the respondent files the return, and the court hears appropriate evidence (if necessary), "[t]he Court . . . must . . . dispose of such party as the justice of the case may require . . . ."

Petitioner fails to convince us that justice and equity entitle her essentially to a new sentencing hearing with respect to her overall sentence. " '[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.' [Citations.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516.) The Legislature has determined LWOP is the appropriate sentence for kidnapping for ransom where death to the victim results. (§ 209, subd. (a).) This sentence has been held to be constitutional, at least when applied to offenders who, like petitioner, were adults at the time of the offense. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 63-64; *People v. Ordonez*, *supra*, 226 Cal.App.3d at p. 1237; cf. *In re Nuñez, supra*, 173 Cal.App.4th at pp. 731-733.)

Habeas corpus is the remedy available to an offender when the record on appeal does not establish the sentence is disproportionate. (*People v. Hernandez* (1985) 169 Cal.App.3d 282, 291.) Petitioner does not claim her sentence is cruel and/or unusual, however, but rather that she wants to argue it is and/or that her offenses should be reduced under section 1385.[12] Yet, she did not make any such argument in the trial court or on direct appeal, and does not now claim trial or appellate counsel rendered constitutionally inadequate representation by failing to make such an argument.[13] She does not persuade us that she would be able to make an adequate showing upon remand. (See *People v. Hernandez*, *supra*, at p. 291.)

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12 Section 1385 permits courts to dismiss factual allegations relevant to sentencing, including those that expose the defendant to an increased sentence. (*People v. Lara* (2012) 54 Cal.4th 896, 900-901.) It has been used to strike ransom and bodily harm allegations so as to reduce the required sentence for kidnapping. (*People v. Marsh* (1984) 36 Cal.3d 134, 143.)

13 We would be unable to assess prejudice, on the record before us, even if such a claim were made.

Our refusal to accord petitioner a remand for reconsideration of her overall sentence does not leave her without a remedy, however. Senate Bill No. 1437 added section 1170.95 to the Penal Code. It provides, in pertinent part:

> "(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:
>
> "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
>
> "(2) The petitioner was convicted of first degree . . . murder following a trial . . . .
>
> "(3) The petitioner could not be convicted of first . . . degree murder because of changes to Section 188 or 189 made effective January 1, 2019. [¶] . . . [¶]
>
> "(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.
>
> "(d)(1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction *and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been [sic] sentenced*, provided that the new sentence, if any, is not greater than the initial sentence. . . .
>
> "(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. *If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner*.
>
> "(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a

> reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, *the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges*. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (Italics added.)

Although the proper construction of section 1170.95 is not before us at this juncture, we can safely assume petitioner will file (if she has not already filed) the requisite petition under its provisions.[14] Assuming the trial court grants the petition, the express language of the statute and the recent case of *People v. Buycks* (2018) 5 Cal.5th 857, 893 (dealing with resentencing under § 1170.18), strongly suggest petitioner will be entitled to a complete resentencing on the remaining counts. Since section 1170.95, subdivision (d)(1) appears to direct that she be resentenced in the same manner as if she had not previously been sentenced, she will have the opportunity to make any arguments that may be relevant to the appropriate sentence on counts 2 and 3.

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14 In light of the provisions of section 1170.95, we agree with petitioner that enactment of Senate Bill No. 1437 did not render the instant petition moot. That being the case, the trial court's order of August 13, 2018, which petitioner asks us to judicially notice, is not relevant to the issues before us.

We also agree with respondent that petitioner must follow the procedure set out in section 1170.95 — i.e., she must file a petition with the sentencing court — if she wishes to challenge her murder conviction based on the newly enacted law. Petitioner's request for judicial notice of the superior court's August 13, 2018, "ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS," is therefore denied.

DISPOSITION

The petition for writ of habeas corpus is granted insofar as it seeks relief from the felony-murder special circumstance. The special circumstance found true under Penal Code section 190.2, subdivision (a)(17) with respect to count 1 is vacated. The matter is remanded to the trial court with directions to resentence petitioner on that count. In all other respects, the petition is denied.

_____
DETJEN, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
PEÑA, J.